IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 565 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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PRAKASH JAMSU PAWAR - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MR DP KINARIWALA for Appellant.
MR PD BHATE, LD.APP PUBLIC PROSECUTOR for Respondent.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 06/08/2007

ORAL JUDGMENT

1. The appellant-orig. convict has preferred present appeal under Section 374 read with Section 386 of the Code of Criminal Procedure, 1973, challenging the judgment and order of conviction dated 12th March 2003 passed by the learned Additional Sessions Judge, Navsari, in

Sessions Case No.135 of 1998. After conclusion of the trial, the learned trial Judge has imposed rigorous imprisonment for three years and to pay a fine of Rs.500/-, in default to undergo simple imprisonment for one month, against the appellant herein for each offence punishable under Sections 363 and 366 of the Indian Penal Code. So far as the offence punishable under Section 376 of the Indian Penal Code is concerned, the learned trial Judge has imposed rigorous imprisonment for seven years and to pay a fine of Rs.500/-, in default of making payment of fine, he is ordered to undergo simple imprisonment for three months; and the learned trial Judge has ordered to run all the sentences concurrently.

2. According to Shri Kinariwala, the learned trial Judge could have acquitted the appellant because number of contradictions which have been brought on record and proved, clearly establish one fact that this is a case of consent and a matter of love affair between the appellant and the victim-girl. The alternative argument advanced by Shri

Kinariwala is that the learned trial Judge at least ought to have imposed lesser punishment than the minimum prescribed which is of seven years for the alleged offence punishable under Section 376 of the Indian Penal Code, when the victim girl herself has not stated that the sexual intercourse was against her wish and will. The learned trial Judge has mainly hammered the point of tender age of the victim girl and accepting the documentary evidence i.e. birth certificate issued by village panchayat Ex.42, the appellant is linked with the crime in question. As per the said document Ex.42, the date of birth of the victim is 23rd July 1982 and the date of commission of offence is 19th March 1998, so as such she had not completed the age of 16 years on the date of incident and she was about to complete the age of 16 years. So at least this Court should allow this appeal partly and reduce the punishment to the period already undergone or at least to five years as the appellant is in prison for the last more than 4½ years.

3. Shri P.D. Bhate, learned Additional Public Prosecutor, considering the oral as well as documentary evidence led by the prosecution has submitted that the learned trial Judge could have imposed imprisonment for the period less than minimum prescribed.

4. To appreciate the submissions made before the Court mainly by Shri Kinariwala, learned counsel appearing for the appellant, the Court would like to state the relevant part of the prosecution case which is reflected in the charge framed by the learned trial Judge which is at Ex.1 page no.25, which is as under :

(i) That on 19th March 1998 at 17-00 hrs., you the accused have committed offence punishable under Section 363 of the Indian Penal Code by kidnappling Rekhaben (aged about 16 years), daughter of complainant-Jamnaben Sonubhai Pavar, resident of mouje Davdahad, Taluka Aahwa, and taking her to village Ambada without consent of the complainant from her lawful guardianship.

(ii) Further on that date and time you the accused have also committed offence punishable under Section 366 of the Indian Penal Code by inducing Rekhaben, daughter of complainant, to marry her and by seducing her kidnapped her for deceitful means to commit sexual intercourse with her without marrying her by taking her to village Ambada.

(iii) Further on that date and time, you the accused have committed offence punishable under Section 376 of the Indian Penal Code by inducing her to marry her committed rape on her without her consent.

5. As mentioned earlier, the victim was to complete the age of 16 years and 04 (four) months and there is no evidence suggesting any forcible sexual intercourse. There is also no cogent evidence under which it is possible to infer that she must have been raped against her wish and will by the appellant. So no positive medical evidence is there as to the commission of rape. In that situation, the

evidence led by the prosecution by placing report of the FSL would not carry the case of the prosecution any further. The victim-girl has stated that the appellant is responsible for the sexual intercourse. When the victim-girl herself has not stated in her deposition that sexual intercourse was done against her wish and will, and the evidence of Dr.Parimalaben J. Joshi, indirectly confirms that this must not be a case of forcible rape, the learned trial Judge could have imposed punishment less than minimum prescribed. The statement of victim-girl which is there on record and discussed by the learned trial Judge in the judgment and order under challenge in paragraph nos.17 and 18, according to me, is sufficient to reduce period of substantive sentence imposed by the learned trial Judge. During the course of cross-examination, the victim-girl had admitted certain following facts :

(i) That the appellant was related to the family of the victim-girl and was visiting her house and she had

developed love affair with him.

(ii) The victim-girl has also admitted that her mother Jamnaben had no liking for the appellant and as she was not preferring the appellant, she was objecting the love affair which was developed between the appellant and the victim-girl.

(iii) The victim-girl has further admitted that when she and the appellant were talking at a place, three females i.e. Sunita, Premila and Vanita had reached there and asked her whether she wants to come back to her home and she had replied in negative.

(iv) She has also admitted that she along with her friends had been to bazaar and the appellant had stopped her in the market.

(v) One more contradictoin which has been proved by the defence-side reveals that the victim-girl had stated before

the police that she and the appellant had developed love affair for the last about one year and her mother Jamnaben was objecting to this as she did not like the appellant and both of them had decided to marry.

6. It is relevant to note that Shri D.P. Kinariwala, learned counsel appearing for the appellant, after some deliberations, has submitted that the appellant does not press this appeal so far as the judgment and order of conviction is concerned; but his alternative argument of modifying and reducing the substantive sentence may be considered sympathetically.

7. According to Shri D.P. Kinariwala, learned counsel appearing for the appellant, in one judgment, this Court has accepted the proposition of law made by the appellant-convict that where there is evidence to show that the victim-girl is more than 15 years of age, then she might have tempted the boy. Of course, in that case, the appellant was

comparatively young than the present appellant. Shri Kinariwala has placed reliance on the decision of this Court in the case of ***Himat Popatlal Raval v. State of Gujarat, reported in 1983(1) GLR 268.*** Of course, on that day the minimum punishment was not of seven years as prescribed by law which has been prescribed in the amended Section 376 of the Indian Penal Code with effect from 23rd December 1983. However, the proviso empowers the Courts to impose punishment less than seven years by giving adequate and special reasons. According to me, the above stated facts are sufficient to impose lesser punishment than minimum prescribed. As such the offence proved by the prosecution is a rap in technical sense, considering the scheme of Section 376 of the Indian Penal Code, the learned trial Judge could have imposed any adequate punishment instead of rigorous imprisonment for seven years. On same set of facts, the punishment for other three offences found proved against the appellant also could have been taken care of by imposing punishment

less than imposed by the learned trial Judge. If the punishment is reduced to five years as suggested by the learned Additional Public Prosecutor, it would meet the ends of justice. This Court even could have reduced the punishment to the period already undergone, but considering the difference as to the age of victim and the appellant, the Court finds that rigorous imprisonment for five years for the offence punishable under Section 376 of the Indian Penal Code would be just and adequate. As the sentence is ordered to run concurrently by the learned trial Judge and this Court is not inclined to disturb that part of judgment and order under challenge, no formal alteration is required to be made in the punishment imposed by the learned trial Judge qua the offences punishable under Sections 363 and 366 of the Indian Penal Code, otherwise this Court could have reduced the period of imprisonment imposed by the learned trial Judge. It is also submitted by Shri Kinariwala that the amount of fine imposed by the learned trial Judge has already been paid by the appellant and he does not press the

present appeal for reduction in the amount of fine imposed by the learned trial Judge.

8. In view of aforesaid observations and discussion, the present appeal is partly allowed. The judgment and order of conviction dated 12th March 2003 passed by the learned Additional Sessions Judge, Navsari, in Sessions Case No.135 of 1998 is upheld; and the judgment and order of sentence passed by the learned trial Judge is hereby modified and reduced to the extent that instead of rigorous imprisonment for seven years for the offence punishable under Section 376 of the Indian Penal Code, the appellant shall now undergo rigorous imprisonment for 5 (five) years; and so far as the sentences of punishment under Sections 363 and 366 of the Indian Penal Code are concerned, the same are confirmed. The order of sentence qua fine remains unaltered so far as the aforesaid offences are concerned. The substantive sentences are ordered to run concurrently.

(C.K. Buch, J)

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